## APPENDIX D

[Filed January 18, 2001]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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| **ROBERT E. KENNEDY,**<br><br>Plaintiff,<br><br>v.<br><br>**CAL A. TERHUNE,**<br><br>Defendant. | Case No. 99CV2505-BTM (CGA)<br><br>**ORDER ADOPTING REPORT AND RECOMMENDATION, DENYING PETITION, DISMISSING ONE CLAIM AND ISSUING CERTIFICATE OF APPEALABILITY IN PART** |

Petitioner, Robert E. Kennedy, has filed a Petition for a Writ of Habeas Corpus ("Petition") challenging his conviction for selling a substance in lieu of a controlled substance and his 25 years to life three strikes sentence. The Magistrate Judge issued a Report and Recommendation that the Petition be denied. The Petitioner filed objections to the Report and Recommendation. The Court holds that the Report and Recommendation properly applied the correct law to the facts. The Court agrees with the Magistrate Judge's analysis and ADOPTS the Report and Recommendation.

Petitioner's request to dismiss that portion of his ineffective assistance of counsel claim relating to failure to object to the gang affiliation evidence is GRANTED. That claim is dismissed without prejudice.

The Petition for Writ of Habeas Corpus is DENIED.

The Court Issues a Certificate of Appealability on the following claims only: (1) whether denial of a transcript of pretrial proceedings and motions in limine was a denial of Petitioner's rights and whether it was harmless error; (2) whether defense counsel was ineffective in failing to seek to have the trial judge reduce the conviction to a misdemeanor; and (3) whether the California three strikes law (Penal Code § 667) provides fair notice that offenses committed prior to its enactment may qualify as strikes. A Certificate of Appealability of DENIED as to all other grounds.

The clerk shall enter judgment dismissing without prejudice the claim of ineffective assistance of counsel for failure to object to gang affiliation evidence and denying the Petition as to all other claims.

IT IS SO ORDERED.

Dated: January 17, 2001

HON. BARRY TED MOSKOWITZ
United States District Judge

[Filed January 19, 2001]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE Case Number 3:-99-cv-02505

Kennedy - PLAINTIFF

v.

Terhune - DEFENDANT

___ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ DECISION BY THE COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT the court adopts the report and recommendation [27-1] and denying the petitioner's petition for Writ of Habeas Corpus; the court grants the petitioner's request to dismiss that portion of his ineffective assistance of counsel claim relating to failure to object to the gang affiliation evidence and issues a certificate of appealability in part

1/19/01
Date

Roberta Westdal
Clerk